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Melissa E. Newman
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EX PARTE

Filed electronically via ECFS

May 24, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-B204
Washington, DC 20554

RE: *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68

In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133

Dear Ms. Dortch:

On May 23, 2006, Qwest filed the attached *ex parte* in the above-captioned proceedings. With this submission Qwest requests that the Commission substitute the attached May 23, 2006 *ex parte* presentation which contains some minor textual changes as well as corrects a few typographical errors.

This *ex parte* and attached corrected ex parte presentation are being filed with the Commission via ECFS pursuant to Rules 1.49(f) and 1.1206(b), 47 C.F.R. §§ 1.49(f), 1.1206(b). Qwest requests that they be made part of the record of the above-referenced two proceedings.

Sincerely,

/s/ Melissa E. Newman

Attachment

Copy via email to:

S. Bergmann
M. Berry
M. Carey
S. Deutchman
S. Feder
D. Griffin
J. Kaufman
T. Navin
J. Rosenworcel
D. Shaffer
D. Stockdale
R. McKenna

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RE: *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68

In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133

Dear Ms. Dortch:

On May 9, 2006, and May 16, 2006, in a series of multiple meetings, Melissa Newman, Lynn Starr and Robert McKenna of Qwest met with (or participated via telephone) Michelle Carey, Ian Dillner, Dana Shaffer, Sam Feder, Joel Kaufman, Matthew Berry, Diane Griffin, Scott Bergmann and Scott Deutchman, to discuss prepaid calling cards. On May 18, 2006, Qwest filed an *ex parte* presentation that followed on those meetings, delineating its arguments and relevant case law in support of its position.

The attached *ex parte* presentation was prepared as a further follow-up to the May 18th presentation. Please contact the undersigned with any questions as to the presentation.

This *ex parte* and attached presentation are being filed with the Commission via ECFS pursuant to Rules 1.49(f) and 1.1206(b), 47 C.F.R. §§ 1.49(f), 1.1206(b). Qwest requests that it be made part of the record of the above-referenced two proceedings.

Sincerely,

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Qwest®
Spirit of Service™

DATE: May 23, 2006

RE: *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68

In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133

EX PARTE PRESENTATION

In the *Prepaid Calling Card Order*, the Commission found that AT&T had for a number of years unlawfully failed to pay access charges for the use of local exchange networks to terminate long distance calls placed with AT&T's so-called "enhanced" prepaid calling cards. Following that order, Qwest brought a lawsuit against AT&T in federal court to recover at least $40 million in tariffed charges that AT&T had improperly withheld.[1] AT&T is now attempting to use the Commission's forthcoming order in this docket to circumvent Qwest's private right of action for damages under existing law. AT&T agrees that existing law requires the payment of access charges for the termination of interexchange calls placed by users of its prepaid calling cards, including so-called menu-driven cards. AT&T claims nevertheless that it would be "manifestly unjust" in light of "equitable" considerations to require AT&T to pay the same tariffed access charges that were paid by other users of Qwest's local exchange network to terminate interexchange calls, and that it thus should be allowed to retain the enormous discount it obtained by misapplying the Commission's access charge rules and failing to pay the rates for access specified in Qwest's interstate and intrastate tariffs.[2]

The Commission cannot grant the relief sought by AT&T for numerous reasons.

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[1] *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, and Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005) ("*Prepaid Calling Card Order*"). AT&T's recently completed and pending mergers have eliminated much of AT&T's potential liability, which is $350 million according to AT&T's prior disclosures. Any amounts owed by pre-merger AT&T to SBC for unpaid access were wiped away by the merger of the two companies. Furthermore, any unpaid access charges owed by AT&T to Verizon are now partially offset by access charges owed by MCI to SBC. Finally, access charges owed by AT&T to BellSouth will represent an internal transfer once the AT&T-BellSouth merger is consummated.

[2] Letter from Jack Zinman, AT&T Services, Inc. to Marlene H. Dortch, FCC, April 27, 2006, WC Docket No. 05-68 ("April 27 Letter").

First, as a matter of law, the Commission may not, based on claims of "equitable" considerations or "manifest injustice," relieve AT&T of liability for access charges due to Qwest and other carriers under interstate and intrastate tariffs for AT&T's prior use of local exchange networks to terminate interexchange calls. Any attempt by the Commission to relieve AT&T of such liability would violate the Communications Act and several decisions of the United States Supreme Court explaining that the Act "create[s] strict filed rate requirements and . . . forbid[s] equitable defenses to the collection of the filed tariff."[3] Indeed, the U.S. Supreme Court and other courts have rejected numerous claims for relief from statutory filed rate provisions, notwithstanding "equitable" considerations far more compelling than AT&T could hope to assert here. Qwest is at a loss to understand why or how the Commission could even consider recognizing an equitable defense to the Act's filed-rate provisions, for the very first time, to benefit the nation's largest telecommunications carrier, when the Commission itself and the courts have consistently rejected such defenses asserted by the very consumers that the Act is supposed to protect.

Second, the ruling sought by AT&T from the Commission also would be inconsistent with the Commission's prior determination in the *AT&T Declaratory Ruling*, under circumstances analogous to those here, that the courts, not the agency, should consider past liability of IXCs for access charges, including arguments by the defendant IXCs that they relied "in fact," and "reasonably" so, on prior Commission statements and actions.[4] There is no way to reconcile AT&T's most recent request for a hand-out from the Commission with this aspect of the *AT&T Declaratory Ruling*.

Third, even if the Commission had the substantive and other authority to consider AT&T's "manifest injustice" claim, AT&T has offered no factual support for that claim. AT&T's assertions that it lacked any reason to believe that its prepaid calling card services (menu-driven or otherwise) were subject to tariffed access charges are unsupported by anything other than the self-serving statements of its attorneys made solely for the purpose of this proceeding. Moreover, AT&T's assertions that prior to the *Prepaid Calling Card Order*, it understood the law to be "reasonably clear" that access charges do not apply to "enhanced" calling cards are contradicted by abundant facts and evidence,[5] including evidence that AT&T is

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[3] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990). *See also, Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 (1939) ("equitable considerations may not serve to justify [the] failure of [a] carrier to collect, or retention by [the] shipper of, any part" of filed rates); *Illinois Cent. Gulf R.R. Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978) ("[e]quitable considerations cannot justify a carrier's failure to collect authorized tariff charges, nor can they be invoked as the basis for an estoppel to collect such charges") (citation omitted); *MCI Telecomm. Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994) ("[t]he filed tariff doctrine precludes a customer from raising equitable defenses to the collection of the filed tariff.").

[4] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7470-72 ¶¶ 21-23, n. 93 (2004) ("*AT&T Declaratory Ruling*") ("[T]he Commission does not act as a collection agent for carriers with respect to unpaid tariff charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal court as appropriate.").

[5] *See* Transcript of Oral Argument, *AT&T v. FCC,* No. 05-0196, Feb. 13, 2006 at 5, line 25 ("Oral Argument Transcript").

seeking to prevent the Commission from analyzing, but that Qwest hopes soon to file. This evidence confirms that AT&T knew all along that its strategy of seeking to exploit purported ambiguities in the Commission's prior orders was risky at best.[6] The simple fact is that AT&T knowingly made decisions to run the regulatory risk of having its so-called enhanced prepaid calling card services "declared telecommunications service, [and] that's their problem."[7] In all events, whether AT&T or any other carrier relied "in fact" on prior Commission statements and actions, and whether any reliance in fact was "reasonable, are "inherently fact-specific" issues for which no meaningful record has been made here.[8]

Fourth, much of the amount at issue in Qwest's lawsuit against AT&T is comprised of unpaid *intrastate* access charges. There is nothing on the record in this proceeding that would justify the preemption of *intrastate* access tariffs as applied to AT&T's use of Qwest's local exchange network to terminate intrastate interexchange calls. The courts have rejected arguments by the Commission and others that the Commission's authority to preempt state regulation of intrastate communications is any greater for information services than it is for telecommunications services.[9] Even if preemptive authority were greater for information services, however, that would not support preemption here, as the Commission has concluded, and AT&T has now agreed, that many prepaid calling cards addressed by this docket are *not* information services.

Fifth, the Commission order sought by AT&T will not avoid, reduce or simplify access charge collection actions filed in courts by Qwest and other terminating carriers, as AT&T asserts.[10] To the contrary, such an order would be used by AT&T and other long distance carriers to argue in those actions that their services are more "like" the services to which the exemption applies than the services to which it does not apply.[11] Stated another way, the order

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[6] Qwest has today filed with the court before which its lawsuit against AT&T is pending an "emergency" motion seeking leave to submit this evidence to the Commission notwithstanding AT&T's inappropriate designations of the materials as "confidential." Not surprisingly, AT&T has opposed Qwest's motion, in order to shield the materials from the Commission.

[7] Oral Argument Transcript at 34 (comment of Judge Randolph).

[8] *AT&T Declaratory Ruling,* 19 FCC Rcd at 7470-72 ¶¶ 21-23. *See also, In the Matter of American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 551-52 ¶ 18 (1989) ("a declaratory ruling may be used to resolve a controversy *if the facts are clearly developed and essentially undisputed"*) (emphasis added).

[9] The FCC has determined that some information services are interstate in nature (*e.g.*, DSL service), and has preempted state regulation of IP enabled services based on mixed jurisdiction. But the FCC's effort to preempt state jurisdiction over all enhanced/information services was not successful. *See People of the State of California v. FCC*, 905 F.2d 1217, 1243-45 (9th Cir. 1990). In the case of prepaid calling card services, jurisdiction is a simple matter -- the end points are obvious, whether one of the end points is a voice-generating computer (if an information service is involved) or another caller.

[10] April 27 Letter at 2.

[11] If the Commission holds that access charges do not apply to the prior use of long distance networks to terminate calls placed through menu-driven and IP-based prepaid calling cards, AT&T will almost certainly argue to the courts that all, or most, of its services, including those that were addressed in the *Prepaid Calling Card Order* and included in AT&T's stay petition, fall within the exemption. For example, AT&T is likely to argue that its cards are menu-driven to the extent a card owner can use a menu to check or add to the balance on the card (*e.g.*, press "1" to make a

sought by AT&T will complicate and prolong litigation, in addition to rewarding carriers for making decisions based on regulatory gamesmanship, and not for legitimate business reasons. Indeed, as counsel for AT&T has candidly admitted, an order granting an exemption from tariffed access charges for past service on the ground of ambiguity in existing law would only encourage carriers to make "minor" and other "tweaks" to their services to avoid access charges based on similar claims of ambiguity in the future.

Simply stated, if the Commission were to accede to AT&T's request and issue an order that would interfere with private rights of actions to collect access charges, it would not only be acting unlawfully but would be acting on factual premises that are unsupported by the record, and are false. Rather than address the issue of AT&T's liability for tariffed access charges for its prior use of local exchange networks to terminate interexchange telecommunications, the Commission should follow the precedent in the *AT&T Declaratory Ruling* and leave analysis of the individual facts and defenses in lawsuits brought against AT&T to the appropriate judicial bodies.

I. Background

A. Nature of the Controversy

AT&T's request that the Commission relieve it of liability to Qwest and other carriers for access charges for the termination of long distance calls placed by users of AT&T's "menu driven" prepaid calling cards is part of a larger set of issues involving the liability of carriers for properly-calculated tariffed access charges for origination and termination of intrastate and interstate long distance telecommunications.[12] Historically, calls placed using prepaid calling cards have, like other long distance calls, including enhanced cards, been treated as part of the provisioning of long distance services. Accordingly, they have been subject to access charges (originating and terminating), which were calculated (for the purpose of determining whether the charges are interstate or intrastate) based on the location of the called and calling parties.[13] Beginning as early as 1994, long distance carriers have added "wrinkles" to these cards such as advertising messages and the ability to transfer a call to a merchant or to a computer. At least some carriers, including AT&T, claim that these features are "enhanced services" under the Commission's *Computer Inquiry* Rules.

For quite some time, however, no one contended that these so-called "enhanced" features changed the nature of the underlying common carrier transmission when a prepaid calling card was utilized, or the applicability of access charges and tariffs to long distance calls placed by users of the cards. IXCs issuing such cards continued to pay access charges for these calls, with

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call; press "2" to check your balance; press "3" to add minutes to the card). If the Commission intends notwithstanding the arguments herein to grant the unlawful exemption sought by AT&T, it should make clear that the exemption does not apply to prepaid calling card services that merely allow a user to use a menu to check or add to the balance on the card.

[12] *See, e.g.*, J. Nuechterlein and P. Weiser, *Digital Crossroads*, at 293 (MIT Press 2005)(discussing "[a]ccess charge arbitrage scandals"); *AT&T Declaratory Ruling, supra.*

[13] *Prepaid Calling Card Order*, 20 FCC Rcd at 4827 ¶ 5.

jurisdiction determined based on the traditional "end points" analysis. In 2002, however, AT&T embarked on a strategy to avoid payment of intrastate access charges by exploiting what it intended later to claim were ambiguities in the Commission's prior statements and actions. For example, AT&T determined unilaterally to classify all calls placed through its prepaid calling cards as "interstate." This sleight-of-hand was intended to replace intrastate access charges with considerably lower interstate charges and, indeed, had precisely such a result.

ILECs and some state commissions understandably objected to this regulatory gamesmanship. Accordingly, on May 15, 2003, AT&T filed a petition for declaratory ruling requesting the Commission to rule that all so-called enhanced prepaid calling card services are properly classified as enhanced or information services, that they are all interstate in nature, and that all such calls are therefore subject to interstate access rates, rather than intrastate rates. In its *Prepaid Calling Card Order*, the Commission found that the so-called "enhanced" prepaid cards described in AT&T's initial petition were telecommunications services, not information services, and that they therefore were subject to access charges based on the standard analysis of jurisdiction (the geographic locations of the calling and called parties).[14] The Commission also included in the *Prepaid Calling Card Order* a Notice of Proposed Rulemaking addressed to the regulatory classification of prepaid calling cards in "a more comprehensive manner."[15] The Commission specifically sought information and argument about prepaid calling cards that give the customer "the option to listen to additional information or perform additional functions before listening to the advertising message" (often referred to as "menu-driven" enhanced prepaid calling cards), and cards wherein IP protocol is used.[16] The Commission inquired as to the classification and jurisdiction of calls placed using these cards. It never suggested that it was considering an exemption from intrastate or other access charges for such calls.

B. Qwest's Litigation with AT&T

On February 28, 2005, Qwest filed a complaint against AT&T in federal court to recover the tariffed access charges that AT&T had sought to avoid through its "enhanced" prepaid calling card scheme. *See Qwest Corp. v. AT&T Corp., et al.*, Civil Action No. 05-CV-375 (REB) (BNB) ("Qwest Complaint"). Qwest seeks actual damages (*i.e.*, unpaid access charges) estimated to be in the tens of millions of dollars, in addition to attorneys' fees, costs and pre-judgment interest.

Qwest's complaint alleges that AT&T:

- concealed and disguised the jurisdiction of interexchange calls placed by users of AT&T's so-called "enhanced" prepaid calling cards and terminated by Qwest;
- delivered interexchange calls over "local interconnection service" trunks, in violation of Qwest's tariffs, to prevent Qwest from billing access charges to AT&T;

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[14] *Id.* at 4830-33 ¶¶ 14-21, 4835-36 ¶¶ 28-29.

[15] *Id.* at 4839 ¶ 38.

[16] *Id.* at 4839-41 ¶¶ 38-43.

- routed interexchange voice traffic over Primary Rate Service facilities, which cannot lawfully be used by interexchange carriers in providing interexchange services to their customers;
- represented that it was using local-only facilities for local traffic, not interexchange traffic;
- substituted the CPN/ANI of the calling card platform for the CPN/ANI of the originating party to conceal the true jurisdiction of the call; and
- overstated the percentage of interstate usage for the prepaid calling card traffic.

In its answer and counterclaim, AT&T asserted that the collection by Qwest of its tariffed access charges for the period prior to the effective date of the *Prepaid Calling Card Order* would be inequitable, and unjust, unreasonable and discriminatory, in violation of 47 U.S.C. §§ 201 and 202. The court denied AT&T's motion to dismiss a portion of Qwest's complaint, and scheduled the case for trial on January 8, 2007. AT&T has sought an exemption from access charges to end-run Qwest's private right of action and the trial scheduled by the court.

II. The Commission May Not, Based on Equitable Considerations, Exempt any IXC from Payment of Tariffed Access Charges for its Prior Use of a LEC's Network to Terminate Long Distance Telecommunications

There is no merit to AT&T's argument that the Commission may lawfully relieve AT&T of its statutory duty to pay tariffed access charges (intrastate as well as interstate) for the termination of interexchange telecommunications. Qwest's statutory right and obligation to collect its tariffed access charges is not subject to any equitable or other defense that AT&T believed in good faith, including in reliance on prior Commission statements and actions, that it was not required to pay those charges. Qwest's lawsuit against AT&T is an action at law, and is based on what the law was at the time the service was provided. The Commission confirmed in the *Prepaid Calling Card Order* that prepaid calling card services are telecommunications services subject to access charges. The law is the same for calls placed using so-called "menu-driven" cards. Any doubt that this was not the law prior to the release of the *Prepaid Calling Order* is foreclosed by the Commission's holding that AT&T had unlawfully withheld contributions to universal service based on revenues previously generated by its prepaid calling card services. AT&T likewise owes Qwest tariffed access charges for the termination over Qwest's local network of the same calls. That is so even if, prior to the release of the *Prepaid Calling Card Order*, or even prior to release of the upcoming order, AT&T had genuinely been confused or misled about the applicability of access charges to these services.

The law forbids the raising of "equitable defenses," such as "manifest injustice," to claims for payment of rates that, by statute, a customer is obligated to pay, and a carrier is obligated to collect. AT&T's "manifest injustice" defense in this context is no different than the defense of the shipper in *Maislin*, rejected by the Supreme Court, that it reasonably and justifiably relied on statements and orders of the relevant agency, the Interstate Commerce Commission, purporting to authorize carriers to charge different rates. Indeed, the equities in *Maislin* were far more favorable to the shipper than they are here to AT&T, because there no party did dispute or could dispute that the ICC purported to authorize an exemption from filed

rates for the services at issue. Here, Qwest and other parties, including the former SBC Communications, have demonstrated that there was no basis for AT&T's alleged confusion.

The decisions of the Supreme Court and other courts forbidding equitable defenses to actions for the collection of filed rates foreclose the exemption from tariffed access charges sought belatedly by AT&T. The cases upon which AT&T and others rely are distinguishable on two separate grounds. First, those cases did not involve application of the law in effect at the time service was rendered. Second, those cases did not involve the adjudication of private claims.[17]

A. The Commission Lacks Authority to Cut Off a Private Litigant's Right to Damages for Failure to Pay Applicable Tariffed Access Charges

In an ex parte presentation in this docket dated May 18, 2006,[18] Qwest demonstrated that the Commission could not, for "equitable" reasons, absolve AT&T of its obligation to pay tariffed rates for services rendered in the past. AT&T's assertions that the relevant law then in effect had been "unclear," and that AT&T had no reason to believe that access charges applied to its so-called "enhanced" prepaid calling card services, even if true, provide no defense to a claim for tariffed rates.

In the May 18 ex parte, Qwest cited a number of cases in which the Commission attempted to prevent a litigant from claiming damages to redress unlawful prior conduct. In each case, the reviewing court reversed, finding that the Commission could not lawfully absolve a litigant of liability for damages to redress such conduct. For example, in *AT&T v. FCC*,[19] the D.C. Circuit vacated the Commission's dismissal of a complaint by AT&T against MCI, based, in part, on the Commission's initiation of a rulemaking on the same subject. The court held that AT&T had a statutory right to a determination whether MCI's past actions violated the law as it existed at the time relevant to the complaint.[20] Similarly, in *MCI v. FCC*, the D.C. Circuit reversed the Commission's dismissal of a complaint by MCI against AT&T for the unlawful bundling of inbound and outbound 800 services, on the basis that the Commission's ruling of unlawfulness in a rulemaking was prospective only.[21] These and the other cases in the May 18 ex parte demonstrate the limits of the Commission's authority to adopt "prospective only"

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[17] As shown in the next section, even if AT&T had some legal basis on which to request the relief from the Qwest lawsuit that it seeks, AT&T's assertion that it failed to understand the existing rules is belied by AT&T's actions in this proceeding and the information uncovered by Qwest in its litigation with AT&T. In those cases involving prospective and retroactive application of a new rule or a changed interpretation of a rule in which manifest injustice is at issue, manifest injustice must be characterized by two factors: 1) actual detrimental reliance on the old rule; and 2) that such reliance was reasonable. AT&T meets neither of these factors.

[18] *See* Letter from Melissa E. Newman, Qwest to Ms. Marlene H. Dortch, FCC, dated May 18, 2006, WC Docket Nos. 05-68 and 03-133 and its attached ex parte presentation of Robert B. McKenna, Qwest ("May 18 ex parte").

[19] *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

[20] *Id.* at 732 ("[T]he agency has an obligation to decide the complaint under the law currently applicable.").

[21] *MCI v. FCC*, 10 F.3d 842, 845 (D.C. Cir. 1993).

rulings.[22] The Commission may not absolve a carrier of liability for damages to redress violations of law in effect at the time of the defendant's conduct merely because the carrier understood the law differently.

The defect in AT&T's argument can also be illustrated through an analogy. In the commercial world, if AT&T entered into a contract to purchase services from Qwest, and did in fact purchase those services, Qwest would be entitled to collect payment for those services based on what a court determined the contract to mean, even if AT&T genuinely believed the contract had a different meaning, and the court found the contract to be ambiguous. Merely because the contract language was ambiguous or confusing does not mean that it has no legal effect. That is equally true here with respect to AT&T's liability under the law in effect at the time Qwest terminated the calls at issue.

Notably, AT&T's predecessor, SBC, has vigorously argued in a closely analogous context that the Commission may not exempt AT&T from access charges for prior use of local networks to terminate long distance calls. Specifically, SBC argued with regard to AT&T's "IP-in-the-Middle" service that "[e]ven if AT&T had detrimentally relied on its erroneous ostensible interpretation of the *Report* [to Congress], any detrimental effect it may experience if required to pay past-due access charges is far outweighed by the inequities the LECs would suffer if the Commission denied them such payments."[23] AT&T's alleged "detrimental reliance" is also outweighed by the "paramount purpose" of the statutory filed rate provisions, which is to prevent discrimination.[24] That consideration is particularly germane here, for if the exemption sought by AT&T were granted, AT&T will have paid substantially less to the LECs for their termination of long distance telecommunications than has been paid by other IXCs.

AT&T's request to the Commission is also defective as a matter of jurisdiction and procedure. If Qwest had brought its complaint against AT&T before the FCC under Sections 206-208 of the Act, the FCC would have been compelled to dismiss it on the basis of lack of jurisdiction.[25] Thus, AT&T is asking the FCC to interfere with Qwest's ongoing collection action despite the fact that the FCC has no jurisdiction over the action itself -- and Qwest would be precluded as a matter of law from seeking redress from the FCC when AT&T declined to pay the proper access charges. Indeed, it was on that very basis that the Commission refused in the *AT&T Declaratory Ruling* to resolve arguments, identical to those here, that it would be manifestly unjust to require AT&T to pay access charges for the termination of interexchange telecommunications using IP protocol for a portion of the transmission, and directed the parties to address those arguments to the courts before which LECs had filed access charge collection complaints.

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[22] *See* May 18 ex parte and its attached ex parte presentation of Robert B. McKenna, Qwest at 4-9.

[23] Letter from James C. Smith, (formerly SBC Communications, Inc.) to Michael K. Powell, FCC Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, WC Docket No. 02-361, January 14, 2004 at 13 ("January 14 Letter").

[24] *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 417 (1986) (filed tariff "prevails because otherwise the paramount purpose of Congress-prevention of unjust discrimination-might be defeated.") (quoting *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922)).

[25] *AT&T Declaratory Ruling*, 19 FCC Rcd at 7471-72 ¶ 23 n.93

B. Any Authority the Commission May Have to Preclude Retroactive Application of Changes in the Law in Other Contexts is Inapplicable Here

As demonstrated in prior submissions by Qwest and summarized above, AT&T's "manifest injustice" analysis has no applicability where, as here, there has been no change in the law, and a carrier is seeking only to collect its tariffed rates under the law in effect at the time the service was provided. The "manifest injustice" analysis is relevant only when a new rule is promulgated (or the law is otherwise changed) and the FCC is considering whether to apply the new rule retroactively.

Even then, retroactivity may only be defeated if a regulated entity had reasonably and detrimentally relied upon existing law, *i.e.*, the law in effect before the new rule was promulgated or adopted. Manifest injustice is not something that can be simply presumed or conjectured -- it must actually be demonstrated. In circumstances such as these, where AT&T was actively attempting to manipulate the access charge system in order to reduce its access payments, it would not be entitled to defeat retroactive application of even a new rule on the basis of manifest injustice.[26] As a result, AT&T would not be entitled to protection from retroactive application of the access charges that Qwest seeks to collect, even if the Commission in the *Prepaid Calling Card Order* had established a "new" rule, or were to establish a new rule in this further proceeding, neither of which is the case.

1. Where an Administrative Agency Applies Existing Rules to New Facts, Retroactive Application of the Decision is "Natural, Normal and Necessary"

In considering the retroactive application of new rules adopted by an administrative agency, the D.C. Circuit has defined two principal categories of agency action: (1) application of existing law to new facts or clarification of existing law; and (2) the substitution of new law for a well-established preexisting body of authority on the same subject.[27] When an action falls within the first category, as is the case here, a retroactive application of the decision is "natural, normal, and necessary."[28]

2. A Party May Only Overcome the Presumption Favoring Retroactive Application of Changes in the Law if Retroactivity Would Cause Manifest Injustice Based on Findings of Actual and Reasonable Detrimental Reliance

Courts have recognized that there is a limited exception to the rule in favor of retroactivity, however, but that exception may be applied only where a party shows that the retroactive application of a new agency rule, or a decision effecting some change in the law,

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[26] *See* January 14 Letter at 12-19.

[27] *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *see also Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) (applying this distinction).

[28] *Id.* at 1554 (quoting *Aliceville Hydro Assoc. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)).

would inflict a "manifest injustice" upon it.[29] To ascertain whether retroactive application of a decision would be manifestly unjust, courts have suggested numerous tests, but in all instances they emphasize the question of whether there has been *actual detrimental and reasonable reliance* on previous authority.[30]

This rule is amply demonstrated in *Verizon*. Part of the dispute in that case turned on a decision of the FCC to order LECs to disgorge End User Common Line (EUCL) fees which were found to have been improperly charged during the time period of 1984 to 1997.[31] The LECs contested the ruling on the grounds that it constituted retroactive ratemaking.[32] The D.C. Circuit disagreed and affirmed the FCC's decision to order the disgorgement. After first concluding that the disgorgement of improperly collected fees did not constitute a retroactive tariff increase, the court turned to the issue of whether the FCC's action might still be barred by the "manifest injustice" standard.[33] The court concluded that it was not.

As the court explained, there were clear problems with the LECs' anti-retroactivity argument. First, from 1984 to 1988, the FCC had been silent on the question of the EUCL fees. In such a situation "no claim of reliance can possibly be maintained."[34] "During this period, the LECs imposed EUCL fees . . . wholly on their own initiative, *i.e.*, without specific guidance from the FCC, and thus entirely at their own risk."[35] Therefore, even though the FCC had later suggested it approved of the LECs' actions, they could still be held liable for their misconduct during the time the FCC was silent. Second, the FCC's policy was "never authoritatively articulated" until the proceeding where the LECs were ultimately held liable.[36] "[T]he agency orders on which the LECs claim to have relied not only had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities. Our cases indicate that under such circumstances reliance is typically not reasonable . . . ."[37] Finally, the court noted that any argument in favor of non-retroactivity is further diminished where the putatively retroactive ruling is the product of judicial review.[38]

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[29] *Verizon v. FCC*, 269 F.3d 1098, 1109 (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

[30] *See id.* at 1109-10 (collecting cases); *see also Garvey v. NTSB*, 190 F.3d 571, 584-85 (D.C. Cir. 1999) ("the issue boils down to the question of whether the regulated party reasonably and detrimentally relied on a previously established rule").

[31] *See Verizon*, 269 F.3d at 1102-03.

[32] *See id.* at 1106.

[33] *Id.* at 1106-1109.

[34] *Id.* at 1110 (emphasis added).

[35] *Id.*

[36] *See id.*

[37] *Id.* (citation omitted).

[38] *See id.* at 1111.

Other court decisions have confirmed the point that an agency's mere silence is insufficient to support a conclusion that a party has detrimentally relied.[39] Indeed, the only conclusion that may ordinarily be drawn from agency silence is "that traditional principles retain their vitality."[40] And in the context of the filed rate doctrine, the "traditional principle" is that administrative agencies may not prohibit carriers from collecting charges based on past tariffs they are owed.[41]

In this case, far from the agency silence that was insufficient to justify exemption from retroactivity found in *Verizon*, ILECs have been consistent and vocal in their insistence that access charge avoidance schemes, such as those represented by AT&T's treatment of enhanced prepaid calling cards, could not be tolerated. AT&T's predecessor, SBC, was a leading advocate of this position.

III. Even if the Commission had the Authority to Relieve AT&T of its Statutory Duty to Pay Qwest's Tariffed Rates, AT&T's Claim of Detrimental Reliance is Unsupported, and Contradicted by the Facts

A. AT&T's Shifting Regulatory Position

AT&T has long argued to the Commission that its "enhanced prepaid calling card services" (including menu-driven and IP-based card services) should be classified as enhanced or information services.[42] But AT&T's view of the consequences of that classification has shifted over time. Initially, AT&T paid interstate and intrastate access charges depending on the end points of the call, *i.e.*, the geographic locations of the calling and called parties. AT&T then took the position that it was required to pay only interstate access charges on enhanced prepaid calling card services.[43] Later AT&T changed its position yet again, admitting that it did not pay terminating access charges on certain enhanced prepaid service calls.[44] It appears, based on public and non-confidential information, that AT&T first developed this position while the Commission was considering the AT&T petition that later was addressed by the *AT&T Declaratory Ruling*. In all events, it appears that AT&T "got it right" when it first introduced its

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[39] *See, e.g., Microcomputer Tech. Institute v. Riley*, 139 F.3d 1044, 1049-51 (5th Cir. 1998) (finding detrimental reliance, even though school was otherwise acting unreasonably, because Department of Education had affirmatively approved the conduct and left it undisturbed for 10 years before attempting to change policy).

[40] *Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1110 (D.C. Cir. 1979).

[41] *See, e.g., ICC v. American Trucking Assn's*, 467 U.S. 354, 361-64 (1984); *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 71-72 (D.C. Cir. 1992).

[42] For example, in a January 2005 ex parte, AT&T stated: "AT&T launched a Promotional Enhanced Prepaid Card service in 1994. AT&T advised the FCC at that time of the service characteristics and, consistent with the Commission's governing enhanced services rules and precedents, AT&T's treatment of the service as an unregulated enhanced service." Letter from Robert W. Quinn, Jr., to Marlene Dortch, Re: AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133, January 13, 2005 (January 13, 2005 letter).

[43] *See* AT&T Corp. Petition for Declaratory Ruling, filed May 15, 2003.

[44] Answer to Qwest Complaint ¶ 31, May 2, 2004.

so-called enhanced prepaid calling cards, and continued to pay interstate and intrastate access charges for the termination of interexchange calls placed by users of the cards. The subsequent evolutions in its position were based on no new law, regulation or decision.

B. AT&T's Actual Conduct as Disclosed in the Current Litigation

AT&T's conduct in Qwest's pending lawsuit against it, which is one of the lawsuits that AT&T seeks to have the Commission halt in its tracks, shows that AT&T has always been aware of a material risk that the so-called enhancements to its prepaid calling cards, and shifting regulatory positions, would not affect the applicability of access charges to the calls placed through the cards. The following is clear even without disclosing the material AT&T has designated, improperly, as confidential.

As a threshold matter, AT&T has already claimed the attorney-client privilege for over a thousand documents relating to the prepaid calling card program going back at least six years that it has refused to disclose in the litigation (documents that almost certainly would foreclose any argument by AT&T that it had no idea that its service could be found to be subject to access charges). Scores of these documents, dating from 2002 to 2005, relate to such subjects as "EPPC [prepaid calling card] legal risk," "EPPC legal strategy," "advice of counsel on . . . EPPC legal risk," "EPPC potential liability exposure," "EPPC routing," "advice of counsel regarding access," "EPPC potential liability analysis," "EPPC architecture," and related topics, as set forth in an as yet incomplete privilege log. A carrier that is secure in its reliance upon a prior "go ahead" from the Commission in modifying its previously correct legal position does not routinely and repeatedly generate analyses of the risk that its conduct may subject it to liability and exposure.

In addition, other documents produced by AT&T in the litigation that are not subject to the attorney-client privilege, but have otherwise been designated "confidential," are highly relevant to analysis of this issue. Qwest will file them with the Commission once the trial court has given it permission to do so.

IV. Conclusion

AT&T has failed on multiple fronts to demonstrate that the Commission may and should issue an order that would, in substance, terminate Qwest's pending lawsuit against AT&T for unpaid tariffed access charges (interstate as well as intrastate). Among these failures, any one of which would make it unlawful and arbitrary for the Commission to accede to AT&T's request, are the following:

- The proposal is based on a misunderstanding of the law. Qwest is entitled to enforce its tariffs based on the law as it existed at the time AT&T used Qwest's local network to terminate the calls at issue. Confusion as to the law, or other "equitable" defenses, do not excuse AT&T from paying tariffed charges for services it utilized.

- Even if the "manifest injustice" cases were applicable to situations where, as here, there has been no change in the law -- which they are not, AT&T could not demonstrate the

existence of manifest injustice. AT&T originally interpreted the law correctly, and its dual deviations from this correct interpretation subsequently clearly cannot meet the "manifest injustice" test.

- AT&T's request for an exemption from its obligation to pay tariffed rates appears also to encompass rates for the termination of intrastate calls as set forth in intrastate tariffs. Even if the law permitted the Commission to exempt AT&T from payment of rates in interstate tariffs, the Commission could not, particularly on the current record, preempt the application of intrastate tariffs to intrastate calls.

AT&T *agrees* that access charges should be paid for origination and termination of telecommunications using enhanced prepaid calling cards, including menu-driven cards. AT&T is correct. This conclusion is equally valid whether the access liability was incurred prior to or subsequent to the issuance of an order in this docket.